In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1094

WILLIAM L. BORCHERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1968. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 1, 1969, and the petition was filed on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's identification as a bank robber was so affected by a pretrial lineup, conducted

prior to this Court's decision in *United States* v. *Wade*, 388 U.S. 218, that he was denied a fair trial.

2. Whether the efforts of petitioner's retained counsel at trial were so inadequate as to result in the denial of effective assistance of counsel.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of bank robbery in violation of 18 U.S.C. 2113(a). On September 11, 1967, he was tentatively given the maximum sentence pending the results of a 90-day study conducted pursuant to 18 U.S.C. 4208(b). His appal was taken before the study was commenced.

The evidence showed that on March 15, 1967, petitioner was observed sitting in his vehicle which was parked in the vicinity of a bank in La Canada, California. His behavior, over a 50-minute period, consisted of writing in some record book, repeatedly putting on and removing a hat and glasses, picking up an attache case, then leaving the car and proceeding toward the back door of the bank (IV R. 12–13, 44, 64).[1] The observers, Miss Jones and Mrs. Hastie, both tellers, made a note of petitioner's appearance and of the number of his car's license tags, NGE 890 (IV R. 16, 27, 28, 35, 45). Shortly thereafter, petitioner entered the bank and obtained change from Mrs. Hastie (IV R. 18, 53). He looked over the bank as he left (IV R. 18, 54). Fifteen minutes later he

[1] "R." refers to the court of appeals record on file with the Clerk of this Court. It consists of five volumes, with the trial transcript being in volumes III, IV, and V.

again entered, this time wearing a hat and glasses (V R. 99, 101). He went to the teller window of a Mrs. Canada, placed an open attache case on her counter, and told her not to sound an alarm but to give him her money (IV R. 81). He obtained $954 from her (V R. 110), and left the bank.

Mrs. Canada testified she was positive petitioner was the robber (IV R. 86). Mrs. Corey, a teller whose station was adjacent to Mrs. Canada's, heard the robber speak, saw him obtain the money, and identified petitioner as the perpetrator of the robbery (V R. 98, 103). The other two tellers, Miss Jones and Mrs. Hastie, identified petitioner as the person they had seen earlier in the parking lot, at Mrs. Hastie's window getting change, and, at the time of the robbery, at Mrs. Canada's window (IV R. 18, 22, 25, 55–56). Two other bank employees saw the robber, whom they did not identify at trial, leave the bank and enter a vehicle with license tag number NGE 890 (V R. 116, 123–124).

When petitioner returned home that evening he was apprehended driving his vehicle with the NGE 890 license tag number (V R. 136). Prior to the robbery petitioner had borrowed money to pay interest on earlier loans and had had some checks dishonored by his bank (V R. 177, 180).

Petitioner, in testifying, acknowledged that on the day of the robbery he had sat in the parking lot in his car, had worn his glasses intermittently as he worked on his accounts,[2] and had gone inside the bank, but

[2] Petitioner was a liquor salesman who travelled a local route calling on customers or making market surveys (V R. 161).

only to obtain change (V R. 169–170). He was certain that he had not obtained change at Mrs. Canada's window (V R. 178–179, 223). Rebuttal evidence showed that shortly after the robbery, latent palm and fingerprints were lifted from the counter of Mrs. Canada's window (V R. 187, 200–201, 222), and that these were identified as those of petitioner (V R. 191, 213).

ARGUMENT

1. Petitioner questions the conduct of a lineup held shortly after he was apprehended (Pet. 11–22), a matter not inquired into at trial (Pet. 6). Petitioner states that he was dressed in the same prison clothes as the other participants in the lineup, and that all were required to wear glasses as they repeated certain phrases. He adds, however, that the others were of a different height, stature, complexion, and age group from petitioner, and that each of the others had a white band on his wrist (Pet. 8). Since the events occurred before this Court's decision in *United States* v. *Wade,* 388 U.S. 218, the absence of counsel is not critical and the identifications would be fatally defective only if they were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Stovall* v. *Denno,* 388 U.S. 293, 302; *Simmons* v. *United States,* 390 U.S. 377, 384. In this case, the record affirmatively indicates that the identification of petitioner at trial was not the result of an improper lineup. The robbery took place in the afternoon in a well-lighted bank; the robber wore no mask; and numerous employees who had been able to see the robber identified him (see

Simmons, supra, 390 U.S. at 385). Indeed, at least one teller, Mrs. Corey, who positively identified petitioner as the robber, did not attend the lineup; she testified she had not seen petitioner between the time of the incident and the commencement of the trial (V R. 103–105). Moreover, petitioner's fingerprints in the area of the robbery, and the obtaining of his car license tag number immediately after the robbery by two witnesses who did not identify petitioner at trial, both corroborate the identification made and indicate that the lineup was not a significant factor in connecting petitioner to the commission of the crime (see Pet. App. 4–5). As the court below properly concluded, "It is abundantly clear from the evidence in this case that the identification of [petitioner] was not dependent on the lineup" (Pet. App. 3).[3]

2. Petitioner's attack on the competency of his retained counsel (Pet. 23–26) is, as the court below noted, nothing more than a hindsight attempt to suggest different trial strategy (see Pet. App. 5–6). Since petitioner admitted being in the bank at the crucial time, counsel could reasonably believe that it would serve no purpose to call witnesses as to his general mode of operation. The effectiveness of the defense in attacking the ability of Mrs. Canada to remember events and in questioning the powers of observation of the other tellers is indicated by the fact that the

[3] The court of appeals further noted that, at all events, "there is no evidence in the record that demonstrates or indicates that the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification so as to deny [petitioner] due process of law" (Pet. App. 3).

jury, after deliberating for a few hours, returned to court and asked that Mrs. Canada's testimony concerning the location of the robber's hands in relation to the attache case be reread (II R. 23–24). That the jury was impressed by the fingerprint evidence, in the face of petitioner's unequivocal statement that he had not been at Mrs. Canada's counter, cannot be regarded as the fault of his counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969